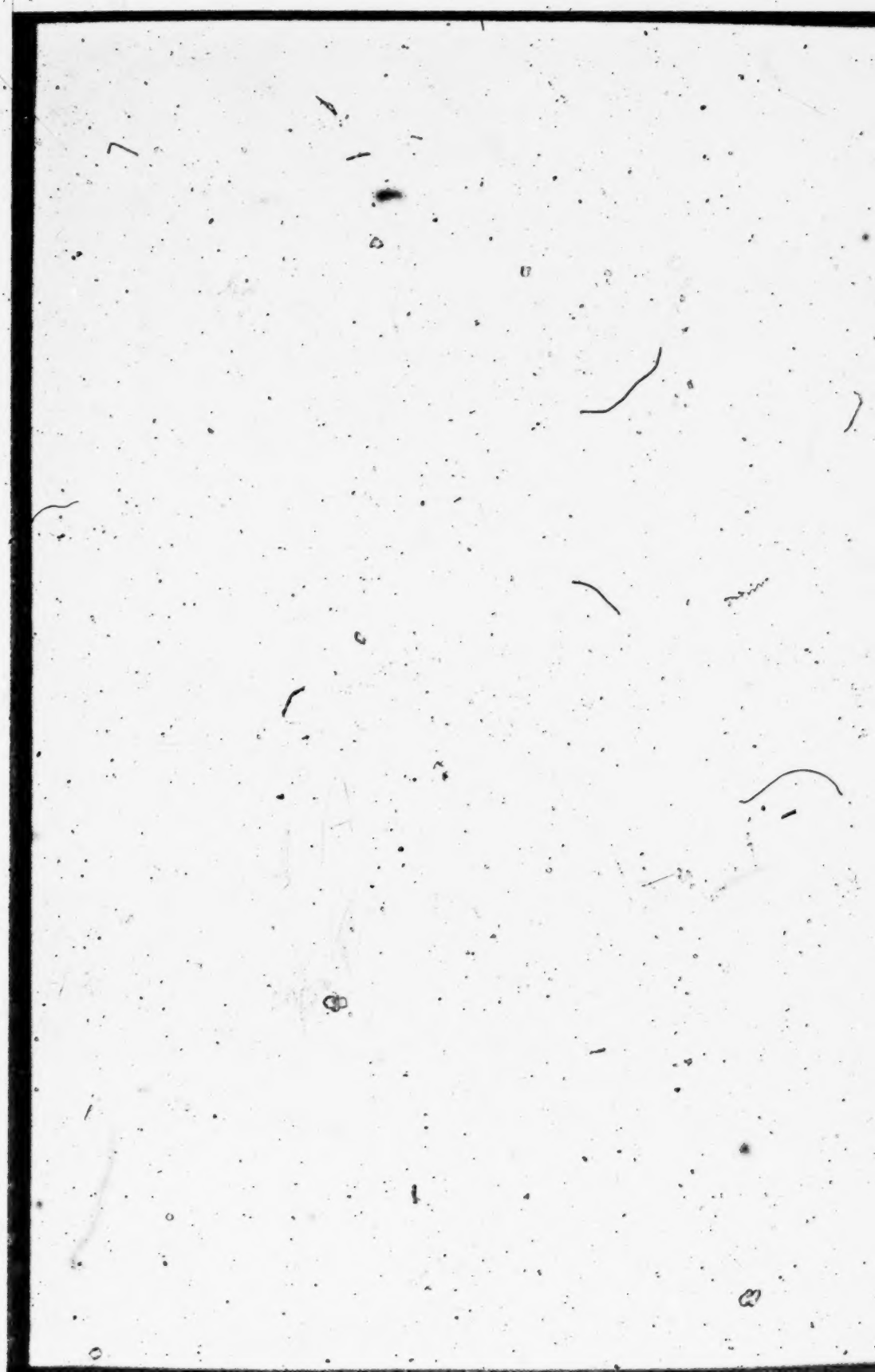

SUPREME COURT, U. S.

FILED
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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1968

No. 750

GLENN MARTIN HARRINGTON,

Petitioner,

vs.

CALIFORNIA.

ON WRIT OF CERTIORARI TO THE COURT OF APPEAL OF THE STATE OF CALIFORNIA, SECOND APPELLATE DISTRICT — DIVISION 2

PETITIONER'S REPLY BRIEF

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INDEX

SUBJECT INDEX

Page

ARGUMENT:

I. The Extrajudicial Statements of the Three Codefendants Bosby, Cooper, and Rhone Do Fall Within the Ban of Bruton v. United States, 391 U.S. 123 (1968), and Roberts v. Russell, 392 U.S. 293 (1968) 2

II. Automatic Reversal of Petitioner's Conviction Is Required Without Recourse to Any Harmless Error Rule; the Admission of the Extrajudicial Statements Were Clearly Harmful to Petitioner Glenn M. Harrington 6

III. The Cases of Bruton v. United States (1968), 391 U.S. 123, and Roberts v. Russell (1968), 392 U.S. 293, Have Been Properly Applied Totally Retroactively and Have Been Made Mandatory Upon the States Via the 14th Amendment, and There Is Absolutely No Need to Once Again Consider the Issue of Retroactivity 21

Conclusions 24

TABLE OF AUTHORITIES

CASES:

Alcorta v. *Texas*, 355 U.S. 28 9

Atwell v. *United States*, 398 F.2d 507 (5th Cir. 1968) 20

Barber v. *Page*, 390 U.S. 719 ..... 3, 21, 22, 23

Bates & Chavez v. *Nelson*, —— U.S. ——, —— L.Ed.2d ——, —— S.Ct. —— 12

Page

Berger v. *California*, —— U.S. ——, —— L.Ed. 2d ——, —— S.Ct. —— 3, 22
Bollenbach v. *United States*, 326 U.S. 607 8
Branch v. *State*, 212 So.2d 29 (Fla., 1968) 19
Brookhart v. *Janis*, 384 U.S. 1 (1966) 3, 5, 9, 21
Bruton v. *United States*, 391 U.S. 123, 375 F.2d 355 (1968) 2, 5, 9, 10, 11, 12, 13, 14, 16, 17, 18, 19, 20, 21, 22, 24
Bujese v. *United States*, 378 F.2d 719 (2d Cir.), 392 U.S. 297 ..... 14, 15
Chapman v. *California*, 386 U.S. 18 (1967) 3, 6, 18
Estes v. *Texas*, 381 U.S. 532 8
Gelis v. *State*, 215 So.2d 86 (Fla., 1968) 19
Gideon v. *Wainwright*, 372 U.S. 335 7
Giles v. *Maryland*, 386 U.S. 66 9
Glasser v. *United States*, 315 U.S. 60 7
Griffin v. *California*, 380 U.S. 609 ..... 3, 4, 6
Hamilton v. *Alabama*, 368 U.S. 52 7
Haynes v. *Washington*, 373 U.S. 503 7
Hopper & Woodward v. *Louisiana*, 251 La. 77 (La.S.Ct.), —— U.S. —— 17
Hunt v. *Connecticut*, —— U.S. ——, 20 L.Ed.2d 1110, 88 S.Ct. 2063, 154 Conn. 517 11
Jackson v. *Denno*, 378 U.S. 368 (1964) 7, 9, 10
Kerr v. *Kerr*, 118 N.Y.Supp. 801, 134 App.Div. 141 (1909) 12
Lynum v. *Illinois*, 372 U.S. 528 7
Malinski v. *New York*, 324 U.S. 401 7
Malloy v. *Hogan*, 378 U.S. 1 9
McCarty & Boyd v. *Kansas*, —— U.S. ——, 20 L.Ed.2d 1115, 88 S.Ct. 2065, 199 Kansas 116 .. 10, 11
Miller v. *Pate*, 386 U.S. 1 9
Miranda v. *Arizona*, 384 U.S. 719 19

Page

Napue v. *Illinois*, 360 U.S. 264 8-9
Nelson v. *United States*, 375 F.2d 739 (1967) (9th Cir.), —— U.S. ——, 88 S.Ct. 2062 14

Payne v. *Arkansas*, 356 U.S. 560 7
People v. *Barbaro*, 395 Ill. 264, 69 N.E.2d 692 (1946) 17
People v. *Bates & Chavez*, 50 C.2d 778 12
People v. *Burwell*, 30 A.D.2d 842, 292 N.Y.S.2d 965 (1968) 19
People v. *Flores*, 68 C.2d 563, 68 Cal.Rptr. 161, 440 P.2d 233 18
People v. *Fox*, —— N.C. ——, 163 S.E.2d 492 (1968) 19
People v. *Scott*, 100 Ill.App.2d 473, 241 N.E.2d 579 16

Rideau v. *Louisiana*, 373 U.S. 723 8
Roberts v. *Russell*, 392 U.S. 293 (1968) 2, 3, 5, 9, 11, 12, 13, 14, 16, 17, 18, 19, 21, 22, 23, 24

Samuel Sheppard v. *Maxwell*, 384 U.S. 333 8
Santoro v. *United States*, 388 F.2d 113 (9th Cir.), —— U.S. ——, 88 S.Ct. 2054 13
Schneble & Snell v. *Florida*, 201 So.2d 881 (Fla. S.Ct.), —— U.S. ——, 88 S.Ct. 2067 17
Serio v. *United States*, 377 F.2d 936 (D.C.Cir.), —— U.S. ——, 88 S.Ct. 2063 14
Spano v. *New York*, 360 U.S. 315 7
Stromberg v. *California*, 283 U.S. 359 8

Tehan v. *Scott*, 382 U.S. 406 4
Tumey v. *Ohio*, 273 U.S. 510 7

United States ex rel. Johnson v. *Yeager*, 399 F.2d 508 (3rd Cir. 1968) 19
United States v. *Hoffa*, 402 F.2d 380 (7th Cir. 1968) 19

Page

United States v. *Kelly*, 399 F.2d 692 (3rd Cir. 1968) 19

United States v. *Lipowitz*, 401 F.2d 591 (3rd Cir. 1968) 19

United States v. *Lyon*, 397 F.2d 505 (7th Cir. 1968) 19

White v. *Maryland*, 373 U.S. 59 7

Whitus v. *Georgia*, 385 U.S. ——, 17 L.Ed.2d 559 8

Williams v. *North Carolina*, 317 U.S. 287 8

IN THE SUPREME COURT OF THE UNITED STATES

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PETITIONER'S REPLY BRIEF

To the Honorable Earl E. Warren, Chief Justice of the United States, and to the Honorable Associate Justices of the Supreme Court of the United States:

I.

Comes now the petitioner, Glenn Martin Harrington, by his Attorney Roger S. Hanson, Esquire, of Woodland Hills, California and replies to the Brief of the respondent State of California now on file with this Honorable Court:

ARGUMENT

I.

The Extrajudicial Statements of the Three Codefendants Bosby, Cooper, and Rhone Do Fall Within the Ban of Bruton v. United States, 391 U.S. 123 (1968), and Roberts v. Russell, 392 U.S. 293 (1968).

Respondent State of California argues that only codefendant George Rhone actually mentioned petitioner by name, while codefendants Cooper and Bosby only described him as "the white man," "the Caucasian," "the patty," and other similar general terms, and since Rhone took the stand and was cross-examined, no *Bruton-Roberts* error was committed in the instant trial.

Such reasoning is not persuasive, for it would be indulging in the height of naivete to promulgate a rule that requires actual mention by name of the petitioner to cause error; when three Negroes and one Caucasian are sitting at the defense table within clear purview of the twelve man lay-jury, and all three of the codefendants describe the crime implicating themselves and another man who is Caucasian with one of them identifying petitioner by name, it is manifestly clear that the testimony of the two codefendants was material and contributed to petitioner's conviction.

The State of California is reminded that even if a harmless error rule should eventually be applied, it shall certainly be the *Federal Rule* and the State of California must declare beyond a reasonable doubt that the error complained of did not *contribute* to the conviction.

The mandates of *Bruton* and *Roberts* are clear. This Honorable Court has studied and restudied the problem. The Honorable Justice Hugo L. Black in *Brookhart* v. *Janis*, 384 U.S. 1 has *already decreed* that "if there is a denial of cross-examination without waiver, it is a constitutional error of the first magnitude and no amount of showing of want of prejudice would cure it."

Roberts v. *Russell*, 392 U.S. 293 has already made the rule totally retroactive and applicable to the states. See also *Barber* v. *Page*, 390 U.S. 719, and *Berger* v. *California*, January 13, 1969, —— U.S. ——, No. 218 Misc. Clearly the statements of the codefendants Bosby and Cooper fall within the ban of *Bruton* v. *United States* and *Roberts* v. *Russell*, *supra*.

To hold otherwise would be to walk a tight-wire where every Court in the nation would be forced to indulge in the soul-searching and often indistinguishable idiosyncrasies of the factual situation of each case; litigation would be *promoted* at the appellate level rather than curtailed.

As the Honorable Justice Potter Stewart has so astutely discerned in his separate but concurring opinion in *Chapman* v. *California* (1967), 386 U.S. 18, 17 L.Ed.2d 705, 722, 87 S.Ct. 824, concerning the applicability of a harmless error to the *Griffin* violation (*Griffin* v. *California*, 380 U.S. 609, 14 L.Ed.2d 106, 85 S.Ct. 1229):

> "To be sure, constitutional rights are not fungible goods. The differing values which they represent and protect may make a harmless-error rule appropriate for one type of constitutional error and not for another. I would not foreclose the possibility that a harmless-error rule might appropriately be applied to

some constitutional violations. Indeed, one source of my disagreement with the Court's opinion is its implicit assumption that the same harmless-error rule should apply indiscriminately to all constitutional violations.

But I see no reason to break with settled precedent in this case, and promulgate a novel rule of harmless error applicable to clear violations of Griffin v. California, 380 US 609, 14 L.ed.2d 106, 85 S.Ct. 1229. The adoption of any harmless-error rule, whether the one proposed by the Court, or by the dissent, or some other rule, commits this Court to a case-by-case examination to determine the extent to which we think unconstitutional comment on a defendant's failure to testify influenced the outcome of a particular trial. This burdensome obligation is one that we here are hardly qualified to discharge.

[9] A rule of automatic reversal would seem best calculated to prevent clear violations of Griffin v. California. This case is one in which the trial occurred before the Griffin decision but which was not final on appeal until afterwards, so the doctrine of prospectivity announced in Tehan v. Shott, 382 U.S. 406, 15 L.ed.2d 453, 86 S.Ct. 459, does not reach it. But the number of such cases is strictly limited. Prosecutors are unlikely to indulge in clear violations of Griffin in the future, and if they do I see no reason why the sanction of reversal should not be the result.

For these reasons I believe it inappropriate to inquire whether the violation of Griffin v. California that occurred in this case was harmless by any standard, and accordingly I concur in the reversal of the judgment."

It is manifestly lucid that the three cross-fertilizing confessions of codefendants *assured* a conviction of this petitioner, and were highly damning, persuasive, and counteracting when the two victims of the robbery admitted under oath that *both* had originally described the robbery as being perpetrated by *four Negroes* (Single Appendix, pages 88, 121). Petitioner Harrington is a Caucasian.

Petitioner has discussed the factual situation, as has the State of California, both in a competent manner; this Honorable Court has given extensive study to the problem, and the mandates are today well established.

Petitioner well qualifies, indeed is more qualified than even the *single* codefendant cases of *Bruton* v. *United States* and *Roberts* v. *Russell,* for automatic reversal of this conviction obtained without opportunity to totally cross-examine; a constitutional error of the first magnitude was committed and no showing of want of prejudice will cure it; 384 U.S. 1. We have the Honorable Justice Hugo Black writing for eight members of this Honorable Court well defining that already in *Brookhart* v. *Janis,* 384 U.S. 1. Further petitioner saith not.

II.

Automatic Reversal of Petitioner's Conviction Is Required Without Recourse to Any Harmless Error Rule; the Admission of the Extrajudicial Statements Were Clearly Harmful to Petitioner, Glenn M. Harrington.

It is to be observed that *Chapman* v. *California* (1967), 386 U.S. 18, 17 L.Ed.2d 705, 87 S.Ct. 824 really applied a harmless error rule to *comments* about the evoking of another constitutional right; certainly no one would advocate as harmless error the situation where a prosecutor forced a defendant to take the witness stand in his own trial against his wishes, or prevented his taking the stand if he desired. If *that* had occurred, it would clearly be a constitutional error of the first order of magnitude, and no showing of want of prejudice would cure *that* error. Beneficently, however, for the prosecutors of this country, this Honorable Court allowed the application of a federal harmless error rule to *comments* by prosecutors concerning the failure of a defendant to voluntarily assume the stand in his own defense; *Chapman* v. *California, supra.*

Clearly the error under consideration in *Griffin* v. *California,* 380 U.S. 609, 14 L.Ed.2d 106, 85 S.Ct. 1229, and *Chapman* v. *California* (1967), 386 U.S. 18, 17 L.Ed.2d 705, 87 S.Ct. 824 was only the *comments* about the exercise of an otherwise constitutional right, and therefore obviously this Honorable Court felt that the error of *comment* fell short of the error of actually inducing the defendant to take the stand, or the preventing of the same.

As the Honorable Justice Potter Stewart has well defined and decreed, in *Chapman* v. *California,* 386 U.S. 18,

17 L.Ed.2d 705, 720, certain errors are to be held automatically reversible.

Among them are:

1. Involuntary confessions; see *Lynumn* v. *Illinois,* 372 U.S. 528, 537, 9 L.Ed.2d 922, 928, 83 S.Ct. 917 (the argument the error in admitting such confession "was a harmless one . . . is an impermissible doctrine."). See also *Malinski* v. *New York,* 324 U.S. 401, 404; *Payne* v. *Arkansas,* 356 U.S. 560, 568; *Spano* v. *New York,* 360 U.S. 315, 324; *Haynes* v. *Washington,* 373 U.S. 503, 518-519; *Jackson* v. *Denno,* 378 U.S. 368, 376-377.

2. Denial of counsel at trial ("The right to have the assistance of counsel is too fundamental and absolute to allow courts to indulge in nice calculations as to the amount of prejudice arising from its denial." *Glasser* v. *United States,* 315 U.S. 60, 76, 86 L.ed. 680, 702, 62 S.Ct. 457). See also *Gideon* v. *Wainwright,* 372 U.S. 335, 9 L.ed.2d 799, 83 S.Ct. 792. See also *Hamilton* v. *Alabama,* 368 U.S. 52, 55, 7 L.ed.2d 114, 117, 82 S.Ct. 157. "We do not stop to determine whether prejudice resulted." In addition, see *White* v. *Maryland,* 373 U.S. 59, 60, 10 L.ed.2d 193, 194, 83 S.Ct. 1050.

3. Trial Judge's remuneration based on scheme giving him financial interest in the result, even if no particular prejudice is shown and even if the defendant was clearly guilty. See *Tumey* v. *Ohio,* 273 U.S. 510, 535, 71 L.ed. 749, 759, 47 S.Ct. 437.

4. Adverse publicity in the community where trial is held is per se grounds for reversal; no showing need be made that the jurors were in fact prejudiced

against the defendant. See *Dr. Samuel Sheppard* v. *Maxwell*, 384 U.S. 333, 351-352, 16 L.ed.2d 600, 613, 614, 86 S.Ct. 1507. (Aided, it might parenthetically be added, by David Janssen as Dr. Richard Kimball in the many-week T.V. Program "The Fugitive"); see also the problems of Texas anhydrous ammonia tycoon Billy Sol Estes, 381 U.S. 532, 542-544, 562-564, 593-594, 14 L.ed.2d 543, 549-551, 561, 562, 586, 587, 85 S.Ct. 1625. See also *Rideau* v. *Louisiana*, 373 U.S. 723, 727, 10 L.ed.2d 663, 665, 83 S.Ct. 1417

5. Instruction of juries on unconstitutional presumptions requires overturning the conviction even though there was ample evidence apart from the presumption to sustain the verdict. See *Bollenbach* v. *United States*, 326 U.S. 607, 614-615, 90 L.ed. 350, 355, 66 S.Ct. 402.

6. Obtaining a conviction on a constitutionally impermissible ground, despite the fact that there was a valid alternative ground on which the conviction could have been sustained. See *Stromberg* v. *California*, 283 U.S. 359, 367-368; *Williams* v. *North Carolina*, 317 U.S. 287, 292.

7. Purposeful discrimination in the selection of grand and petit juries is automatically reversible without a necessity to show prejudice to the defendant convicted under such a disability. See *Whitus* v. *Georgia*, 385 U.S. ——, 17 L.ed.2d 559, 87 S.Ct. 643.

8. To the above may be added the significant cases on the knowing use of perjured testimony to obtain a conviction; these have been reversed without recourse to "harmless error rules." See *Napue* v. *Illinois*, 360

U.S. 264, 3 L.Ed.2d 1217, 79 S.Ct. 1173; *Miller* v. *Pate*, 386 U.S. 1, 87 S.Ct. 785, 17 L.Ed.2d 690; *Alcorta* v. *Texas*, 355 U.S. 28, 2 L.Ed.2d 9, 78 S.Ct. 103; *Malloy* v. *Hogan*, 378 U.S. 1, 12 L.ed.2d 653, 84 S.Ct. 1489; *Giles* v. *State of Maryland*, 386 U.S. 66, 17 L.Ed.2d 737.

The reason, of course, is that these errors were "constitutional errors of the first order of magnitude and no showing of want of prejudice would cure them," per Justice Hugo Black, *Brookhart* v. *Janis*, 384 U.S. 1.

Likewise is the instant error in the case at bar. The denial of a right to confront *all* witnesses testifying against the defendant is a denial of a constitutional right of the first order of magnitude, whenever it happens, wherever it happens, and no matter what other evidence could support the conviction, 384 U.S. 1, Justice Black expressing the views of eight members of this Court.

Petitioner urges that without explicitly adjudging in either *Bruton* v. *United States*, 391 U.S. 123, or *Roberts* v. *Russell*, 392 U.S. 293, this Honorable Court has already decreed that no harmless error rule shall be applied to the instant error, for it is of the class of errors of the first order of magnitude. If the error in *Jackson* v. *Denno*, 378 U.S. 368, 376-377 is automatically reversible, so must this error.

This Honorable Court is reminded that the instant error is potentially much more dangerous than the *Jackson-Denno* error for the simple reason a confession which is ordered to be not considered against defendants not making it still physically remains in the case against the maker; as such it may and usually is taken into the jury room as an exhibit to be read and reread, ingested, digested, and discussed.

The implicating features as to the other codefendants are thus able to make recurring, machine-gun-like impressions on the minds of the jury, offset only by the already-held-inadequate instructions to the jury to disregard the confession as to all non-makers. Of course, in the *Jackson* v. *Denno* error, the confession was totally removed from the case.

It seems without fear of contradiction that if the error condemned in *Jackson* v. *Denno,* 378 U.S. 368, is not to be saved by a harmless error rule, so much more shall the instant error fail of rescue.

This Honorable Court has already considered numerous cases under the *Bruton-Roberts* error, and has remanded them for further consideration in light of the above decisions.

It is, therefore, beneficial to inquire into the facts of some of these cases to ascertain whether other evidence existed in addition to the confession of one codefendant which implicated the other.

Jack Lloyd McCarty and John Boyd v. *Kansas,* —— U.S. ——, 20 L.Ed.2d 1115, 88 S.Ct. ——, June 10, 1968, was remanded to the Kansas Supreme Court on behalf of petitioner Boyd. At 199 Kansas 116, the opinion of the Kansas Supreme Court sets out the evidence against John Boyd in addition to McCarty's implicating confession. McCarty and Boyd held up a Topeka, Kansas liquor store. Boyd was clearly identified by prosecution witness Taylor when leaving the scene of the crime in the get-away car, whose license was obtained. Taylor followed the car, giving police a description. Shortly thereafter, both men were apprehended together, the police finding them with the get-away auto, having in their possession several 25¢ coins

marked with red X's, which were used by a customer to purchase a bottle of liquor immediately before the crime. In rejecting any contention that the yet-to-be decided *Bruton-Roberts* error existed, the unanimous Kansas Supreme Court stated:

> "The evidence against Boyd, from sources other than McCarty's statement, was persuasive . . ." (199 Kans 116, 122).

Hence it appears that certainly other convincing evidence existed to convict Boyd—an eye witness, marked coins, an identified get-away car. This Honorable Court gave no heed to all that other evidence in remanding to the Supreme Court of Kansas; this Court noted the violation of *Bruton* and *Roberts* and summarily remanded.

In *Donald E. Hunt, Petitioner* v. *Connecticut,* —— U.S. ——, 20 L.Ed.2d 1110, 88 S.Ct. ——, remand was ordered to the Supreme Court of Connecticut on June 10, 1968, for further consideration in light of *Bruton-Roberts.*

At 154 Conn. 517, the Supreme Court of Connecticut treated the evidence against Hunt. Connecticut police came upon a totally naked woman running from the woods, claiming she had been raped by Hunt and codefendant Doten. Immediately the also totally naked Hunt was arrested. Photographs taken showed severe scratch marks on Doten's face and on Hunt's nose, and bruises and abrasions on the face, arm, knee, and back of the complainant. The complainant identified both men as the rapists. Doten implicated Hunt with a statement.

Whatever the damning nature of the statement, other evidence existed to convict Hunt both directly and circumstantially—the direct testimony of the complainant, the

scratches and abrasions on the parties, and the circumstantial fact of finding Hunt and the prosecutrix totally naked in the woods certainly presented a solid case against Hunt, for being naked with the complainant, "it is presumed he saith not a pater noster there" (*Kerr* v. *Kerr,* 118 N.Y. Supp. 801 (1909), citing Burton's Anat. of Mel., vol. 2, pt. 3, Sec. 3, Mem 1, Sub 2).

Yet, this Honorable Court did *not* let the additional evidence bother it in remanding to meet the reversing mandates of *Bruton* and *Russell,* 391 U.S. 123 and 392 U.S. 293, respectively.

In perhaps one of the more famous capital punishment-premeditated first degree murder-arson cases in all of California history, *People of the State of California* v. *Clyde Bates and Manuel Chavez,* 50 C.2d 778, Bates and Chavez were condemned to California's San Quentin Penitentiary gas chamber for their deliberate arson of the Mecca Bar in Los Angeles following an altercation there. The pair went to a gas station and purchased 5 gallons of gas in an open pail container, and returned to the bar, sloshing it all over the floors and bar and igniting it with a match. *Seven* people were burned to death. Codefendant Hernandez made statements to the police implicating Bates and Chavez in the crime. However, it is quite clear that other independent evidence was available to convict both Bates and Chavez; numerous eye witnesses, the service station attendant who sold the gas in an open, unmarked, non-red container in violation of local law itself, and the general irrefutable web of circumstantial evidence wrought by the close temporal proximity of all events presented an excellent prosecution case without the implicating confession of codefendant Hernandez. Yet at —— U.S. ——, ——

L.Ed.2d ——, —— S.Ct.——, ..., 1968, this Honorable Court remanded the *Bates-Chavez* case to the Ninth Circuit Court of Appeals for reconsideration in light of *Bruton* v. *United States,* 391 U.S. 123, and *Roberts* v. *Russell,* 392 U.S. 293; this originally capital punishment case, under initial jurisdiction of the Supreme Court of California under California Penal Code Section 1239 b, was relegated to life imprisonment sentences when California Governor Edmund G. Brown commuted the death sentences in late 1967 before leaving office.

Petitioner assumes, as does his counsel, that this Honorable Court remanded to local courts all of the above cases to allow the local courts to order the reversals, in keeping with the generally recognized traditions of minimal interference of federal courts in State Criminal Proceedings; petitioner and his counsel assume it was not done for any question or hesitation on the part of this Honorable Court whether or not the cases clearly demanded reversal in light of *Bruton* v. *United States* (1968), 391 U.S. 123, and *Roberts* v. *Russell* (1968), 392 U.S. 293.

Similarly, in *Phillip Santoro* v. *United States,* —— U.S. ——, —— L.Ed.2d ——, 88 S.Ct. 2054, 388 F.2d 113 (1967), this Honorable Court remanded in light of *Bruton-Roberts;* the appellant was found with stolen credit cards belonging to one Ralph Sieben, whose stolen Cadillac appellant was attempting to sell when apprehended by the F.B.I.

Ninth Circuit Court of Appeal Justice Stanley Barnes, in affirming appellant's conviction at 388 F.2d 113, 115, stated:

> "The evidence, other than the implication contained in these statements, was ample to sustain the jury's verdict."

Gary David Nelson v. *United States*, —— U.S. ——, —— L.Ed.2d ——, 88 S.Ct. 2062, 375 F.2d 739 (1967) was remanded for *Bruton-Roberts* errors. While the opinion below has a paucity of detail, Chief Judge Richard Chambers stated at 375 F.2d 739:

> "The evidence as to Nelson was largely circumstantial, but convincing."

Hence, it is apparent that again this Honorable Court remanded without hesitation when the *Bruton-Roberts* error occurred.

See also *August J. Serio* v. *United States*, —— U.S. ——, —— L.Ed.2d ——, 88 S.Ct. 2063, 377 F.2d 936.

In *United States* v. *Jeffrey Bujese*, 392 U.S. 297, —— L.Ed.2d ——, 88 S.Ct. 2064, 378 F.2d 719, Bujese's co-defendant Hutchins pleaded not guilty and *took the stand*. After denying on direct examination having committed the robbery, he confessed to the crime on cross-examination before the jury after the government had confronted him with his previously signed confession. The signed confession, introduced into evidence, implicated Bujese. At several points thereafter, the trial court instructed the jury that Hutchins' confession implicating Bujese was "not binding" on Bujese. In two instances, including the charge to the jury, which included the following, the judge told the jury that the confession was not to be used "as against" Bujese:

> "Under no circumstances is the signed confession of Hutchins to be considered as against Bujese.
>
> "You see, the reason it is admissible against Hutchins is because it is an admission against interest. Admis-

sions against interest are always allowable in law as against the party who makes it.

"As against Bujese, however, it would be pure rank hearsay, and I think we all know, even non-lawyers, that hearsay is not allowable against you. You must have competent evidence.

"The statement of Hutchins against Bujese is hearsay. It is not binding on him in any event."

It is important to here note the following portion of the opinion below, at 378 F.2d 719, 720:

"After Hutchin's confession in open court, appellant (Bujese) called him (Hutchins) as a witness for the defense, whereupon Hutchins testified that the statement in his signed confession implicating appellant was wrong, and that in fact, appellant had refused to participate in the robbery. *There was substantial evidence against appellant, however,* to support the jury's verdict."

This Honorable Court's attention is called to the fact that it remanded *United States* v. *Bujese*, 392 U.S. 297, 20 L.Ed.2d 1113, 88 S.Ct. 2064, 378 F.2d 719 to the United States Court of Appeals for the Second Circuit in light of *Bruton-Roberts* even when the following occurred at trial:

1. The codefendant Hutchins, who had made the implicating confession, *took the stand and was subjected to full examination, both cross and direct;*

2. The codefendant Hutchins was also later called to the stand as a defense witness for Bujese, and attempted

to counteract the confession, he was here again subjected to full cross-examination.

Thus it is evident that this Honorable Court does not distinguish between the situations whether the codefendant takes the stand or does not take the stand for cross-examination purposes, in evaluating a *Bruton-Roberts* error; this Honorable Court summarily remanded to allow the lower court to effect relief in the way of reversal in light of the directives of *Bruton* and *Roberts* v. *Russell*.

It is therefore evident that in the instant case now at bar, the fact that codefendant George Rhone did take the stand should be of no consequence; the *Bruton-Roberts* error occurred, and the case should be automatically reversible.

Petitioner Glenn Martin Harrington, via his counsel, encourages this Honorable Court to spell out with specificity in its opinion in the instant case that the fact that a codefendant does take the stand shall not save the case from reversal when it is afflicted with the *Bruton-Roberts* error.

It is to be noted that, as appellant and petitioner extensively has already pointed out in his opening brief, the State of Illinois does not tolerate the *Bruton-Roberts* error, and reverses summarily if it occurs. In a recent case, *People* v. *Scott*, 241 N.E.2d 579, 583, 100 Ill.App.2d 473, in reversing, the Court stated:

"We also suggest that the defendants be tried separately if the State again intends to use Walker's oral statement. As related by the police, Walker's statement detailed the principal role played by Scott in the burglary. It was neither made in Scott's presence nor

assented to by him and, despite warnings by the court that it should be considered only as to Walker (as was done in the instant case) *its use would be prejudicial error.* Bruton v. United States, 391 U.S. 123, 88 S.Ct. 1620, 20 L.Ed.2d 476 (1968); Roberts v. Russell, 392 U.S. 293, 88 S.Ct. 1921, 20 L.Ed.2d 1100 (1968). See too, People v. Barbaro, 395 Ill. 264, 69 N.E.2d 692 (1946) . . . *The fact that Walker took the stand and that Scott had an opportunity to cross-examine him did not mitigate the error . . .*"

It is therefore evident that the Illinois Appellate Court interprets the mandates of this Honorable Court in *Bruton* v. *United States,* 391 U.S. 123, and *Roberts* v. *Russell,* 392 U.S. 293 to mean *automatic reversal without recourse to harmless error rules,* and *it is immaterial whether the co-defendant takes the stand or not;* the judgment is summarily and automatically reversed.

See also *Donald Felix Schneble and Edward Frank Snell* v. *State of Florida,* 201 So.2d 881, Supreme Court of Florida, 1967, —— U.S. ——, —— L.Ed.2d ——, 88 S.Ct. 2067, remanded by this Honorable Court for violation of the *Bruton-Roberts* doctrine.

See also *State of Louisiana* v. *John T. Hopper and Joe A. Woodward,* Supreme Court of Louisiana, 251 Louisiana 77, 134-137, —— U.S. ——, —— L.Ed.2d ——, —— S.Ct. ——, remanded on *Bruton-Roberts,* where each defendant Hopper and Woodward gave cross-implicating confessions. That factual situation did not deter this Honorable Court from remanding.

In finality, this petitioner calls to the attention of this Honorable Court that of the cases cited by respondent State

of California in its brief under issue II, in support that *Bruton* should be subjected to the federal harmless error standards of *Chapman* v. *California*, 386 U.S. 18, some were decided *prior to* this Honorable Court's decisions in *Bruton* v. *United States*, 391 U.S. 123, and *Roberts* v. *Russell*, 392 U.S. 293.

See *People* v. *Flores*, 68 Cal.2d 563, 568, 68 Cal.Rptr. 161, 164, 440 P.2d 233, 236 (1968), decided May 9, 1968; *Bruton* was decided May 20, 1968. The *Flores* case however alluded to the *Bruton* decision, by way of modification of the original opinion, and contended that the following language of *Bruton* did not require automatic reversal:

> "Not every admission of inadmissible hearsay or other evidence can be considered to be reversible error unavoidable through limiting instructions . . ." (391 U.S. 123, 1035.)

The California Supreme Court opinion at 568 of 68 Cal.2d 563 fails to point out, however, that this Honorable Court went on in its opinion in *Bruton* to state (20 L.Ed.2d 476, 485):

> *"Nevertheless, as was recognized in Jackson* v. *Denno, supra, there are some contexts in which the risk that the jury will not, or cannot, follow instructions is so great, and the consequences of failure so vital to the defendant, that the practical and human limitations of the jury system cannot be ignored . . . Such a context is presented here, where the powerfully incriminating extrajudicial statements of a codefendant, who stands accused side-by-side with the defendant, are deliberately spread before the jury in a joint trial . . . REVERSED."*

In *United States* v. *Lipowitz,* 401 F.2d 591, 593 (Third Circuit, 1968) the *Chapman* rule was applied because *all* of the testimony of the codefendant was stricken, and the Court *distinguished Bruton* v. *United States,* 391 U.S. 123 from their instant case at bar.

It is interesting to note that in *United States ex rel. Johnson* and *Cassidy* v. *Yeager,* 399 F.2d 508, 510-511, the Court of Appeals for the Third Circuit granted a Writ of Habeas Corpus for the *Bruton* error in the famous case denying retroactivity of the rule of *Miranda* v. *Arizona* by this Honorable Court, 384 U.S. 719; while alluding to the possibility of the use of the *Chapman* harmless error rule, the Court concluded on the basis of the facts of the case, the situation was much too critical to risk contemplation, and concluded that they could not say the error was harmless beyond a reasonable doubt (399 F.2d 508, 511).

Without the mandates of *Roberts* v. *Russell,* 392 U.S. 293, the United States Court of Appeals for the Seventh Circuit reversed without recourse to a harmless error rule in *U.S.A.* v. *Lyon,* 397 F.2d 505, 510 for violation of *Bruton* v. *United States,* 391 U.S. 123.

See also *U.S.A.* v. *Kelly,* 399 F.2d 692, Third Circuit 1968; *People* v. *Fox,* —— N.C. ——, 163 S.E.2d 492, 502 (1968); *Branch* v. *State,* 212 So.2d 29, 32-33 (Fla. 1968); *Gelis* v. *State,* 215 So.2d 86 (Fla. 1968); *People* v. *Burwell,* 30 A.D. 2d 842, 292 N.Y.S.2d 965 (1968).

Petitioner is quick to point out that the case relied on by the respondent State of California, *United States* v. *James R. Hoffa,* 402 F.2d 380, 387 (Seventh Circuit, 1968), for the theory that the jury *can* follow limiting instructions, is to be clearly distinguished from *Bruton;* in the *Hoffa* case, at 386 of 402 F.2d 380, the Court stated:

"These statements were not incriminating with respect to the indictments in this case or as to any co-defendant."

Hence, it is clear that if the statements were not incriminating, apparently no *Bruton* error occurred, and the issue *could* be handled by jury instructions.

Naturally, the *Hoffa* case cannot even be applied in the instant case, *Harrington* v. *California*.

Petitioner further does not agree with respondent State of California that "the language used in cases such as *Atwell* v. *United States*, 398 F.2d 507, 510-11 (Fifth Circuit 1968) indicates no automatic reversal"; it simply fails to discuss the harmless error aspects in reversing; it is just as logical to conclude that the Court has inferred that *Bruton* and *Roberts demands* reversal and there is no need to further discuss the error.

Petitioner here shall conclude his brief with the admonition to this Honorable Court that there was independent evidence apart from the confession and implicating statements of codefendant William James Evans which could have served to convict George William Bruton. In 375 F.2d 355, 357, 362, 363, the lower Court recounts the clear eyewitness identification of Bruton by postal employee Shirley Miller, plus the clear identification of codefendant Evans by both Miss Miller and store owner Paul J. Robinson. *Independent evidence did exist*, but this Honorable Court was quick to *reverse totally without recourse* to Harmless Error Rules, and without "remand for further consideration" because the error committed was "one of the first order of magnitude and no want of prejudice would save

it," per the Honorable Justice Hugo Lafayette Black, in *Brookhart* v. *Janis*, 384 U.S. 1.

The mandates are clear; as the hart panteth after the water brooks (Psalm 42:1), petitioner eagerly anticipates the mandate of this High Tribunal to settle once and for all this immensely troubling area of criminal procedure on a national level, totally retroactive, without recourse to "harmless error rules," and without further "remand for additional consideration not inconsistent with the instant opinion."

III.

The Cases of Bruton v. United States (1968), 391 U.S. 123, and Roberts v. Russell (1968), 392 U.S. 293, Have Been Properly Applied Totally Retroactively and Have Been Made Mandatory Upon the States Via the 14th Amendment, and There Is Absolutely No Need to Once Again Consider the Issue of Retroactivity.

The State of California urges this Honorable Court to consider again its decision to give total retroactive application to the mandates of *Bruton* v. *United States* (1968), 391 U.S. 123, and *Roberts* v. *Russell* (1968), 392 U.S. 293.

There is no need whatsoever to reconsider the well reasoned opinions of *Bruton* v. *United States* and *Roberts* v. *Russell, supra.*

Indeed, this Honorable Court has once again after *Bruton* and *Roberts* considered the retroactivity problem. In the major decision *Barber* v. *Page* (1968), 390 U.S. 719, —— L.Ed.2d ——, 88 S.Ct. 1318, this Honorable Court recognized the violation of the confrontation clause in the error of using preliminary hearing transcript testimony in the

actual trial without exercising due diligence to subpoena the witness, by merely reading that testimony to the jury. This procedure was, of course, held unconstitutional *without recourse to harmless error rules.*

In the late California decision *Donald Berger* v. *California*, January 13, 1969, —— U.S. ——, —— L.Ed.2d ——, —— S.Ct. ——, No. 218, Misc. Oct. Term 1968, this Honorable Court gave the mandates of *Barber* v. *Page, supra*, total retroactivity, citing with approval again its reasoning in *Bruton* v. *United States* (1968), 391 U.S. 123, and *Roberts* v. *Russell*, 392 U.S. 293. The Court stated:

"Per Curiam.

Petitioner was convicted of robbery and kidnapping for the purpose of robbery. The victim, one Carl Arthur Dunston, testified against petitioner at a preliminary hearing; there was evidence that at the time of the trial Dunston was in Colorado. A state investigator tried to contact Dunston on the telephone; he got through to some of Dunston's relatives and to his employer, but not to Dunston himself. Although two telegrams were received, allegedly from Dunston, no subpoena was served. At trial, the transcript of Dunston's preliminary hearing testimony was introduced into evidence. On appeal, the Court of Appeal for the Second Appellate District of California held that this procedure did not deny petitioner his Sixth Amendment right to be confronted with the witnesses against him since Dunston was absent from the State of his own free will and since petitioner's counsel had had an adequate opportunity to cross-examine Dunston at the preliminary hearing. —— Cal.App.2d ——, 66 Cal. Rptr. 213 (1968). The California Supreme Court

denied petitioner a hearing on April 4, 1968. Nineteen days later we held in the case of *Barber* v. *Page*, 390 U.S. 719, that the absence of a witness from the jurisdiction would not justify the use at trial of preliminary hearing testimony unless the State had made a good-faith effort to secure the witness' presence. The sole question in this case is whether the holding of *Barber* v. *Page* should be given retroactive application. We think that it should.

Clearly, petitioner's inability to cross-examine Dunston at trial may have had a significant effect on the 'integrity of the fact-finding process.' Linkletter v. *Walker*, 381 U.S. 618, 639 (1965); cf. *Roberts* v. *Russell*, 392 U.S. 293 (1968); *McConnell* v. *Rhay*, 393 U.S. —— (1968). As we pointed out in *Barber* v. *Page*, one of important objects of the right of confrontation was to guarantee that the fact-finder had an adequate opportunity to assess the credibility of witnesses. 390 U.S., at 721. And California's claim of a significant countervailing interest based upon its reliance on previous standards, see *Stovall* v. *Denno*, 388 U.S. 293, 297 (1967), is most unpersuasive. *Barber* v. *Page* was clearly foreshadowed, if not preordained, by this Court's decision in *Pointer* v. *Texas*, 380 U.S. 400 (1965), which was handed down more than a year before petitioner's trial. Accordingly, we can see no reason why *Barber* v. *Page* should not be given fully retroactive application.

The motion for leave to proceed *in forma pauperis* and the petition for writ of certiorari are granted. The judgment of the Court of Appeal is vacated and the case is remanded for reconsideration in light of this Court's decision in *Barber* v. *Page*, 390 U.S. 719 (1968).

It is so ordered."

It is axiomatic that this Honorable Court will not here in the instant case reverse those well reasoned decisions, indeed, will likely not even consider doing so; the retroactivity matter and issue is truly moot.

Conclusions

For all and each of the foregoing reasons, arguments, and authorities, *supra,* in the instant reply brief, as well as the similar matters in petitioner's opening brief, petitioner Glenn Martin Harrington prayerfully and respectfully petitions this Honorable Supreme Court of the United States of America to reverse his conviction; to delineate and make exceedingly clear on a national basis the exact mandates of *Bruton* v. *United States* (1968), 391 U.S. 123, and *Roberts* v. *Russell,* 392 U.S. 293; to reverse this conviction without recourse to any harmless error rule, and to decree that such shall be the nation-wide consequence of this decision and opinion; to summarily reverse without further remand to lower courts for further considerations, and for such other and further relief as to this Honorable Court may seem just.

Respectfully, prayerfully, and humbly submitted at Woodland Hills, in the State of California.

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Supreme Courts of California,
Illinois, Michigan and Iowa.

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